2005

Provo City v. Miguel David Gedo : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

PROVO CITY, Plaintiff / Appellee vs. MIGUEL DAVID GEDO, Defendant / Appellant	Case No. 20050086-CA

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, PROVO DEPARTMENT, FROM A CONVICTION OF DISORDERLY CONDUCT, AN INFRACTION, INTERFERENCE WITH ARRESTING OFFICER, A CLASS B MISDEMEANOR, AND RECKLESS DRIVING, A CLASS B MISDEMEANOR, BEFORE THE HONORABLE SAMUEL MCVEY.

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e)(Supp. 2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred when it denied Miguel Gedo's Motion to Dismiss/Suppress and found that the issue regarding the search of the vehicle for the

vehicle identification number was irrelevant at that time, the towing of the Gedos' vehicle was justified, and thus, no evidence should be suppressed nor the case dismissed.

Standard of Review. "A trial court's findings of fact underlying its decision to grant or deny a motion to suppress must be upheld unless they are clearly erroneous. However, [an appellate court] review[s] the trial court's legal conclusions in regards thereto under a correction of error standard." *State v. Wagstaff*, 846 P.2d 1311, 1312 (Utah App. 1993).

2. Whether the trial court erred when it ruled that Miguel[1] was not justified in using force to prevent the towing of his vehicle when there were alternative legal means that satisfied the requirements of due process.

Standard of Review. "[I]n cases involving mixed questions of fact and law where the judge makes a determination on contested facts, [an appellate court] view[s] the evidence in a light most favorable to the trial court's ruling and reverse[s] only if the necessary factual findings implicit in the court's ruling lack sufficient evidentiary support." *State v. Gardiner*, 814 P.2d 568, 574 (Utah 1991).

3. Whether the trial court erred when it did not find any selective prosecution on the basis of the Gedos' race nor any evidence of overall discrimination against Latinos by the Provo City police.

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[1]Because the appeals for Miguel and James Gedo are closely related and share transcripts, this brief will refer to the Appellant as Miguel and to his brother, the Appellant in 20050087-CA, as James in order to avoid confusion.

Standard of Review. "[I]n cases involving mixed questions of fact and law where the judge makes a determination on contested facts, [an appellate court] view[s] the evidence in a light most favorable to the trial court's ruling and reverse[s] only if the necessary factual findings implicit in the court's ruling lack sufficient evidentiary support." *Gardiner*, 814 P.2d at 574.

CONTROLLING STATUTORY PROVISIONS

Utah Code Ann. § 76-9-102(1)(b), (3) Disorderly Conduct

(1) A person is guilty of disorderly conduct if:

(a) he refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(b) intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he:

(i) engages in fighting or in violent, tumultuous, or threatening behavior;

(ii) makes unreasonable noises in a public place;

(iii) makes unreasonable noises in a private place which can be heard in a public place; or

(iv) obstructs vehicular or pedestrian traffic.

* * *

(3) Disorderly conduct is a class C misdemeanor if the offense continues after a request by a person to desist. Otherwise it is an infraction.

Utah Code Ann. § 76-8-305 Interfering with Arresting Officer

A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or detention of that person or another and interferes with the arrest or detention by:

(1) use of force or any weapon;

(2) the arrested person's refusal to perform any act required by lawful order:

(a) necessary to effect the arrest or detention; and

(b) made by a peace officer involved in the arrest or detention; or

(3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or detention.

Utah Code Ann. § 41-6-45 (2003) Reckless Driving

(1) A person is guilty of reckless driving who operates a vehicle:

(a) in willful or wanton disregard for the safety of persons or property; or

(b) while committing three or more moving traffic violations under Title 41, Chapter 6, Traffic Rules and Regulations, in a series of acts within a single continuous period of driving.

(2) A person who violates Subsection (1) is guilty of a class B misdemeanor.

STATEMENT OF THE CASE

Miguel was charged by information filed in the Fourth Judicial District Court charging that on or about March 5, 2003, Miguel David Gedo committed the crimes of Criminal Mischief, a Class B Misdemeanor, in violation of Utah Code Ann. § 76-6-106([2])(c),(d); Disorderly Conduct, a Class C Misdemeanor, in violation of Utah Code Ann. § 76-9-102; Interference with Arresting Officer, a Class B Misdemeanor, in violation of Utah Code Ann. § 76-8-305; and Reckless Driving, a Class B Misdemeanor, in violation of Utah Code Ann. §41-6-45 [(2003)]. (R. at 0001-0003).

On April 21, 2003, an arraignment was held before Judge Guy R. Burningham. Miguel entered a not guilty plea for each charge filed, obtained an Affidavit of Indigency, and signed a promise to appear for pretrial conference on May 20, 2003. (R. at 0013-

0014). On May 20, 2003, Miguel was found indigent by the Court and Laura Cabanilla was appointed to represent Miguel. (R. at 0015, 0019). The matter was continued for a pretrial conference on July 3, 2003. (R. at 0019, 0021-0022). When Miguel failed to appear for the July 3, 2003, pretrial conference, a bench warrant was issued. (R. at 0028-0031). On August 5, 2003, Miguel appeared before Judge Gary D. Stott regarding the warrant, and the matter was set for a pretrial conference on August 12, 2003.

On August 12, 2003, Miguel appeared before Judge Guy R. Burningham regarding the return on the bench warrant. At the same hearing, Scott Card was appointed as Miguel's public defender, and the matter was set for a pretrial conference on September 25, 2003. (R. at 0035, 0039). While the record does not contain a Notice of Withdrawal or Order of Withdrawal for Laura Cabanilla, apparently, she had previously withdrawn with court permission "when she could not locate [Miguel] as he was traveling from the country at that time." (R. at 0071). On September 25, 2003; November 18, 2003; and December 18, 2003, the matter was continued, with the last continuance setting a new pretrial conference on February 12, 2004. (R. at 0058, 0063, 0067). On February 12, 2004, Judge Anthony W. Schofield granted Scott Card's motion to withdraw, reappointed Laura Cabanilla to represent Miguel, and set the matter for a pretrial conference on February 24, 2004. (R. at 0072-0076).

On February 24, 2004, the matter was again continued with a new pretrial conference set for April 6, 2004. (R. at 0085). On April 6, 2004, the matter was

continued until June 7, 2004. (R. at 0087-0088). On June 7, 2004, after Judge Samuel McVey denied the Motion for a Bill of Particulars filed by Miguel's counsel, the matter was set for a final pretrial conference on August 26, 2004 and a jury trial on September 14, 2004. (R. at 0092-0093). On August 26, 2004, Miguel's counsel moved to join this case with James Gedo's case (also currently on appeal under case number 20050087-CA), the September 14, 2004, jury trial was stricken, a final pretrial conference and law and motion hearing was set for September 20, 2004, and the jury trial was set for November 23 and 24, 2004. (R. at 0104-0105). On September 20, 2004, Judge McVey denied the Motion to Dismiss on the criminal mischief charge filed by Miguel's counsel. (R. at 0111-0112). On November 9, 2004, Miguel's counsel filed a Motion to Dismiss/Suppress arguing the same issues argued on this appeal. (R. at 0115-0129). The motion was set for hearing on December 2, 2004. (R. at 0131).

On December 2, 2004, Judge McVey denied the Motion to Dismiss/Suppress. (R. at 0142-0144). At that hearing, Miguel's counsel argued, either orally or by reference to the motion, that Cadet Trotter's search for the vehicle identification number (VIN) was illegal, the towing of the Gedos' vehicle was not authorized by Utah law, (T.0261:49 at 13-25), Utah Code Ann. §§ 76-2-401 and 76-2-406 justified the use of force in defense of the Gedos' property, (T.0261:57 at 5-13), and the numerous charges against and police incidents involving Miguel and James as well as some comments by police and a prosecutor indicated that Miguel and James had been selectively prosecuted.

(T.0261:61at 2-11). Provo City responded, either orally or through its Memorandum in Opposition to Defendant's Motion to Dismiss/Supress, that nothing was "discovered or seized that [was] being used as evidence in this case" from the VIN Search, (R. at 0135), Provo City Code § 9.17.080 authorized the towing of the vehicle for four or more unpaid parking tickets, (T.0261:64 at 19-23), Miguel was not authorized to use force where there was no criminal interference with his property, (T.0261:65 at 9-22), and Miguel failed to show that he was "treated disparately under the law as written or applied" due to his race. (T.0261:66 at 4-8). Judge McVey declined to rule on the issue regarding the search of the vehicle for the VIN, reserving the right to reconsider "if it turns out that the VIN, is . . . critical to the prosecution in the future." (T.0261:71 at 3-11). Judge McVey also found the towing of the vehicle justified, and that "any forcible defense of the property was not justified," and Judge McVey did "not find any selective prosecution on the basis of racial category . . . nor any evidence of overall discrimination against Latinos by the Provo City Police." (T.0261:79 at 14-25).

A jury trial was held on December 8 and 9, 2004, before Judge Samuel McVey. (R. at 0145-0147). Miguel was found not guilty of Criminal Mischief, a class B misdemeanor; not guilty of Disorderly Conduct, a class C misdemeanor; guilty of Disorderly Conduct, an infraction; guilty of Interfering with an Arresting Officer, a class B misdemeanor; and guilty of Reckless Driving, a class B misdemeanor (R. at 0149-0153). On January 20, 2005, Miguel was sentenced to the statutory maximum for both

Class B Misdemeanors, with all but twenty-one (21) days of jail suspended. (R. at 0157-0159). On January 25, 2005, defendant filed a timely appeal. (R. at 0212).

STATEMENT OF RELEVANT FACTS

The circumstances surrounding the incident leading to the charges against Miguel and James were as follows:[2] In the morning of March 5, 2003, Provo City Parking Cadet Linda Trotter was checking vehicles on 450 West in Provo City for expired registrations and improper parking. (T.0261:18 at 17-19). Cadet Trotter noticed a red and gray GMC Suburban with Utah plate 148ZRG that was "long over expired" parked in front of an apartment complex at 1741 North 450 West. (T.0261:18 at 22-25). After Cadet Trotter entered the number of the plate into her computer to write a ticket for the infraction (T.0261:19 at 19-21), information on her computer from Provo City's collections department indicated that the vehicle was to be towed for four or more unpaid

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[2]The circumstances surrounding the incident leading to the charges against Miguel were presented in testimony during a hearing on December 2, 2004, and during his jury trial on December 8 and 9, 2004. However, over concern of the cost of extensive transcripts, Gedos' counsel and Provo City agreed to limit the transcripts to various pertinent hearings and only one testimony, that of Officer Phillip Webber, from the jury trial. (R. at 0204; 20050087-CA R. at 0254-0256). Nevertheless, the testimony offered by Cadet Trotter during the December 2, 2004, motions hearing and the testimony of Officer Webber from the trial are mostly sufficient to illustrate Provo City's version of the events. For the remaining facts, Provo City, as specifically indicated below, stipulates to some of the other facts indicated in Miguel's brief. The record, however, does not contain the testimony of Miguel and James regarding their version of the events that took place on March 5, 2003. Nevertheless, the Statement of Relevant Facts in Miguel's appellate brief adequately describes the Gedos' version of the events. Provo City does not contest that the Gedos made the statements claimed in Miguel's Statement of Relevant Facts, but Provo City does not agree that the statements provide a true and correct description of what occurred on March 5, 2003.

parking tickets. (T.0261:20 at 5-16). Cadet Trotter then called the Provo City collections department and verified the four unpaid parking tickets. (T.0261:21 at 2-7). Cadet Trotter contacted dispatch and had them run the plate, but the dispatcher said that the plate was not on file, which did not surprise Cadet Trotter "with a date that old." (T.0261:21 at 9-10, 15-20).

Cadet Trotter also contacted the tow company to tow the vehicle. (T.0261:21 at 10-11, 22-23). When the information on her computer indicated the plate belonged with a different car, Cadet Trotter decided to do a VIN search on the GMC. (T.0261:22 at 2-7). The VIN in the window was covered with debris and paper, and Cadet Trotter was unable to locate the number underneath the GMC. (T.0261:22 at 9-14). When the tow truck arrived, Cadet Trotter asked the tow truck driver to open the GMC's door, so she could get the VIN. (T.0261:22 at 11-14). The driver opened the door and Cadet Trotter obtained the VIN, which registered to a Kenneth Parker of American Fork, Utah. (Aplt. Brf. at 6).

When the tow truck arrived, Cadet Trotter moved her vehicle across the street and to the south about half a house from the GMC. (T.0261:22-23 at 24-25, 1-7). The tow truck driver proceeded to back in to put the truck's hooks underneath the GMC. (T.0261:23 at 11-12). Cadet Trotter then noticed that a man had approached the truck driver and was speaking with the tow truck driver, but Cadet Trotter was unable to hear their conversation. (T.0261:23 at 18-22). Cadet Trotter did hear that man yell over his

shoulder something to the effect of, "you're not going to steal my car," as he was going back into his house. (T.0261:24 at 13-15).

That individual then reentered the house and both individuals then exited. (Aplt. Brf. at 8). Miguel apparently then entered the GMC and attempted to start it. (Aplt. Brf. at 8). Cadet Trotter felt the tow truck driver needed assistance and drove up and stopped parallel to the GMC. (Aplt. Brf. at 8). Cadet Trotter testified, with some contrary testimony by Miguel, that Miguel opened his car door into Cadet Trotter's jeep with such force and violence that Miguel created a dent and three deep scratches to her vehicle. (Aplt. Brf. at 8). Cadet Trotter further testified that Miguel was then able to start the GMC with the assistance of James and drove the GMC off of the tow truck lift, and the GMC was parked in the Gedos' driveway. (Aplt. Brf. at 9).

Cadet Trotter testified that she drove into the driveway, parking behind the GMC with her jeep in an effort to prevent the Suburban from being driven away. (Aplt. Brf. at 9). Cadet Trotter testified that James approached her vehicle and screamed at her. (Aplt. Brf. at 9). She then called for backup, and shortly thereafter several police vehicles arrived. (Aplt. Brf. at 9-10). The testimony of various officers indicated that both of the Gedos had separately and in different directions left the property. (Aplt. Brf. at 9).

Officer Webber testified he later found Miguel walking south on the Provo River trail. (T.0262:10 at 1-2). Officer Webber further testified that Miguel, with his hands in his pockets, was walking towards Officer Webber, when Officer Webber

ordered Miguel to stop and get down on the ground, but Miguel refused. (T.0262:10 at 2-4). Due to "several threats over the years to [Officer Webber] personally and to police officers in general" and due to the assault on [Cadet Trotter] and on two vehicles, Officer Webber "was concerned for [his] safety and the safety of those who lived in the apartment complex [Miguel] was supposed to be in." (T.262:9 at 2-4, 8-9, 18-24). Thus, when Miguel failed to respond to Officer Webber's order to stop and get down on the ground, Officer Webber drew his weapon. (T.262:10 at 4). Officer Webber testified that Miguel was about 150 or 200 feet away when Officer Webber ordered Miguel to get down on the ground, and that Miguel "definitely heard it." (T.262:12 at 16-22). When these events took place, Officer Webber was dressed in a police uniform, (T.262:12 at 23-25), and had just arrived in a police car. (T.262:13 at 3-4).

When Officer Webber told Miguel a second time to get down, Miguel continued walking towards Officer Webber and "told [Officer Webber] on two occasions to go ahead and shoot him." (T.262:14 at 8-11). As Miguel continued to walk towards Officer Webber and as Officer Webber continued to tell Miguel to stop and get down on the ground, "Officer Billings ran up behind [Miguel] and tackled him, took him to the ground." (T.262:16 at 2-4). Officer Webber than holstered his weapon and assisted in handcuffing and taking Miguel into custody. (T.262:16 at 4-5).

SUMMARY OF THE ARGUMENT

The jury found Miguel guilty of violating Section 76-9-102(1)(b), (3), Utah Code Annotated, Disorderly Conduct, an infraction; Section 76-8-305, Utah Code Annotated, Interference with Arresting Officer, a Class B misdemeanor; and Section 41-6-45(2003), Reckless Driving, a Class B misdemeanor. Miguel challenges the verdict and appeals for dismissal of the charge.

The trial court did not err when it denied Miguel's Motion to Dismiss/Suppress. While the law in Utah regarding a warrantless search for a vehicle identification number (VIN) is unclear, the search, even if unlawful, did not result in any incriminating evidence that was used at trial, nor did it cause Miguel's unlawful actions. The seizure of the vehicle was authorized by the Provo City Code and was lawful under both the Provo City Code and the Utah Code. Utah law clearly disallows a "defense of property" defense against a police officer in the course of her duty. Finally, Miguel failed to show that Provo City failed to prosecute similarly situated persons and that Provo City discriminated against Miguel because of his race.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE MOTION TO DISMISS/SUPPRESS BECAUSE THE VEHICLE IDENTIFICATION NUMBER WAS IRRELEVANT TO THE ISSUES OF THE CASE, PROVO CITY'S ORDINANCE PROPERLY AUTHORIZED THE TOWING OF MIGUEL GEDOS' VEHICLE, AND THE TAINT OF ANY ILLEGALITY WAS REMOVED BY MIGUEL GEDO'S SUBSEQUENT ILLEGAL ACTIONS.

A. The Search of the VIN did not result in any incriminating evidence used at trial.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002). Although the language of Article I, Section 14 of the Utah Constitution follows the Fourth Amendment almost precisely, the Utah Supreme Court has been willing "to adopt more protective standards under the state Constitution" under the right circumstances." *State v. Larocco*, 794 P.2d 460, 466 (Utah 1990) (plurality). While a warrantless search for a VIN is clearly legal under the Fourth Amendment, *N.Y. v. Class*, 475 U.S. 106, 119 (1986), it is not so clear in the state of Utah. *Larocco*, 794 P.2d 460 (plurality rejects *Class* and requires exigent circumstances for VIN search); *State v. Anderson*, 910 P.2d 1229, n5 (Utah 1996) (plurality rejects *Larocco* as "not the law of this state"); *State v. Poole*, 871 P.2d 531, 536 (Utah 1994) (Associate Chief Justice Stewart, concurring, expressly states that his concurrence in *Larocco* did not "indicate acceptance of the constitutional theory asserted therein."); *State v. Brake*, 2004 UT 95, ¶31, 103 P.3d 699 (unanimous opinion rejects *Class* and cites *Larocco* approvingly once).

Regardless of the legality of the VIN search here, however, Miguel has failed to show any evidence improperly obtained that was used at trial. Rather than simply denying the portion of Miguel's motion to suppress regarding the VIN, Judge McVey expressly reserved that issue in case "it turn[ed] out that the VIN [was] critical to the

prosecution in the future." (T.0261:71 at 7-9). At the Motion to Suppress hearing, rather than arguing that the VIN was evidence of wrongdoing, Miguel's counsel argued that the VIN was evidence in mitigation, showing that Miguel's vehicle did not have four unpaid parking tickets. (T.0261:53 at 10-17). Miguel's brief merely argues that the VIN search "*may* have led to further cause for impoundment," (Aplt. Brf. at 18) (emphasis added), not that it actually resulted in any incriminating evidence. The VIN information was irrelevant to the charges filed against Miguel. Thus, Judge McVey had no reason to suppress the VIN either at that point or later. Along the same lines, Miguel has failed to show "a reasonable likelihood that the [purported] error affected the outcome in the trial court." *See State v. Verde*, 770 P.2d 116, 120-21 (Utah 1989).

B. Provo City Code § 9.17.080(4) authorized towing under these facts; Utah Code allows local ordinances, like Section 9.17.080(4), that are consistent with the Utah Code.

The Utah Code authorizes municipalities "to regulate the movement of traffic on the streets, sidewalks and public places." Utah Code Ann. § 10-8-30. More specifically, the Utah Code authorizes "[l]ocal authorities [to] adopt ordinances consistent with [Title 41, Chapter 6), and additional traffic ordinances which are not in conflict with this chapter." Utah Code Ann. § 41-6-16 (2003); *currently* § 41-6a-207. Pursuant, in part at least, to this authority, Provo City enacted Section 9.17.080(4), which authorizes the towing of "[a]ny motor vehicle with respect to which four (4) or more Notices of Infraction are in default." Because the vehicle later claimed by the Gedos had four or

more defaulted parking tickets, Cadet Trotter had authority under a Provo City ordinance, which was allowed under the Utah Code, to tow the Gedos' vehicle.

Miguel's brief essentially makes two arguments in support of the claim that the towing was improper: 1) the Utah Code did not specifically authorize towing under these circumstances and 2) neither Miguel nor James was cited for any violation which allowed towing. The previous paragraph adequately shows why the first argument fails: the Provo City Code authorized the tow, and the Utah Code allows for such city ordinances. This conclusion is supported by the language of Utah Code Ann. §§ 41-1a-1101 and 41-6-102(2003), currently § 41-6a-1405, which both specify different situations when an officer "may" tow a vehicle without limiting language regarding when an officer may *not* tow a vehicle.

As to the second argument, neither the Utah Code nor the Provo City Code requires an arrest or citation before a vehicle may be towed. In fact, Utah Code Ann. § 41-1a-1101(2003) makes no mention of requiring a citation, and it specifically authorizes the towing of an abandoned vehicle, which would not involve a citation at all. More precisely, Provo City Code § 9.17.080(4) allows an officer to tow a vehicle with four long-unpaid parking tickets but it makes no mention of a requirement that the officer cite the owner or possessor of the vehicle. While an arrest may authorize the impoundment of a vehicle, *see State v. Criscola*, 21 Utah 2d 272, 275-76 (1968), the law clearly does not require it.

C. The taint of any allegedly illegal search or seizure was removed by Miguel Gedo's subsequent illegal actions.

When evidence is obtained by or because of unconstitutional conduct by State agents, the typical remedy is to exclude the evidence illegally obtained. *See State v. Shoulderblade*, 905 P.2d 289, 292 (Utah 1995). However, "an individual's response to police misconduct, such as fleeing or attacking an officer, can . . . intervene to break the connection between police lawlessness and later-discovered evidence." *Id.* at 295. Even following illegal activities by the police, "[w]here the defendant's response itself is a new, distinct, crime," evidence of that crime is admissible. *Wagstaff*, 846 P.2d at 1313.

In the current case, even if the officers' conduct was illegal, Miguel's conduct clearly constituted new crimes. The facts in *Wagstaff* illustrate this point. In *Wagstaff*, officers found a plastic bag apparently containing marijuana. *Id.* at 1311. After the officer placed the bag on a nearby table, Wagstaff grabbed the bag, put it into his mouth and began to chew it. *Id.* at 1311-12. For purposes of the motion to suppress, the State stipulated that the initial seizure of the property was illegal. *Id.* This Court determined that regardless of the legality of the underlying seizure, "Wagstaff's actions following the seizure of his property supported a separate and distinct charge." *Id.* at 1312-13. Thus, even if Miguel is correct that the search of the VIN and the seizure of his vehicle were unlawful, the trial court did not err in allowing the charges filed to go forward as those charges only involved Miguel's illegal actions subsequent to the search and seizure.

II. THE TRIAL COURT DID NOT ERR WHEN IT RULED THAT MIGUEL GEDO WAS NOT JUSTIFIED IN USING FORCE TO DEFEND HIS PROPERTY BECAUSE USING FORCE IN DEFENSE OF PROPERTY IS NOT AUTHORIZED AGAINST AN OFFICER ACTING WITHIN THE SCOPE OF AUTHORITY OF A PEACE OFFICER.

Utah Code Ann. § 76-2-406 justifies "using force, other than deadly force, against another when and to the extent necessary to prevent or terminate criminal interference with real or personal property: (1) lawfully in his possession." However, the Utah Supreme Court has held that in Utah there is no "common law right to resist an illegal search or arrest." *Gardiner*, 814 P.2d at 574. "If such a defense exists in Utah, it must be grounded in the specific code sections under which [the defendant] was convicted." *Id.* Analyzing Section 76-2-406 specifically, the Court in *Gardiner* determined that "the actions of law enforcement officers taken within the course of their duties are not within the category of intrusions that may be lawfully resisted." *Id.* at 576. Whether an action is in the course of an officer's duty is "whether an officer is doing what he or she was employed to do or is 'engaging in a personal frolic of his [or her] own.'" *Id.* at 574 (change in original).

In this case, Miguel's charges involved both peace officers as well as a parking cadet, a civilian officer hired under Provo City Code to enforce civil ordinances only. The charge of Interfering with Arresting Officer under Section 76-8-305 clearly arose from an actual peace officer's attempt to detain or arrest Miguel, so the holding in *Gardiner* is clearly on point. The other two convictions come from charges that appear to

have arisen from interactions with Cadet Trotter and reactions to her activities as a parking cadet.

While *Gardiner* only covers peace officers specifically, the same reasoning applies with equal force to a cadet or other person acting under state authority with sufficient indicia to indicate she is acting under state authority. As noted in *Gardiner*, "[t]he societal interest in the orderly settlement of disputes between citizens and *their government* outweighs any individual interest in resisting a questionable search. One can reasonably be asked to submit peaceably and to take recourse in his legal remedies." *Id.* at 572 (emphasis added). As noted by Judge McVey below, "[t]here w[ere] peaceable means that w[ere] provided by the city affording [the Gedos] due process which . . . they could go through without disturbing the peace or breaching the peace." (T.0261:70 at 21-24). In addition, to the same extent it is true against peace officers, "[s]elf-help measures undertaken by a potential defendant who objects to the legality of the search can lead to violence and serious physical injury." *Gardiner*, 814 P.2d at 572. Finally, whether the search is done by a civilian government agent or a peace officer, "in cases of illegal searches, the subject of the search has 'the assurance that any evidence so acquired is rendered inadmissible in a subsequent criminal trial.'" *Id.*

Thus, under the reasoning of *Gardiner*, Miguel was not justified in the use of force against a peace officer or a government employee showing the indicia of government authority. The vehicle Cade Trotter was using at the time was clearly labeled

as a police vehicle, (*see* R. at 0003, 0061, 0096, 0100, and T.0216:4 at 19-20) (all indicating police vehicle owned by Provo City), and Miguel has made no assertion that he did not know that she was acting under authority of law. Since Miguel was not justified in the use of force against the peace officers or Cadet Trotter, the trial court correctly determined that Miguel should have simply relied on the provided proper and legal means to protect his property rather than resorting to force.

In addition to the inapplicability, generally, of the justified force statute to resisting peace officer actions, the statute also only applies when there is "criminal interference" with property. As noted previously, Cadet Trotter had authority under the Provo City Code, which was in accordance with the Utah Code, to tow the vehicle. When a person has legal authority to interfere with property, it is clearly not "criminal interference" with property.

Finally, where peaceable means are available, using force is no longer "*necessary* to prevent or terminate criminal interference with real or personal property." *See* Utah Code Ann. § 76-2-406. Judge McVey noted that Provo City had afforded Miguel due process by providing "peaceable means . . . which they could go through without disturbing the peace or breaching the peace." (T.0261:70 at 21-24). *Gardiner* also noted that under the current system, where legal remedies are available and the long-term risk to a defendant is less pronounced, the reasons for the common law right to resist an unlawful arrest or search no longer applied with such force. 814 P.2d at 571-72. Here,

Miguel had lawful, non-forceful means to assert and protect his rights, so breaking the law was not *necessary*.

III. THE TRIAL COURT DID NOT ERR WHEN IT FOUND NO PRIMA FACIE SHOWING OF SELECTIVE PROSECUTION BECAUSE MIGUEL GEDO FAILED TO PROVE UNEQUAL TREATMENT BASED ON A SUSPECT CLASS, OR, IN OTHER WORDS, THAT THE PROSECUTOR FAILED TO PROSECUTE SIMILARLY SITUATED PERSONS THAT WERE NOT MEMBERS OF THE SUSPECT CLASS.

"Prosecutors are given broad discretion in determining whether to prosecute." *State v. Geer*, 765 P.2d 1, 3 (Utah App. 1988) (citing *Wayte v. U.S.*, 470 U.S. 598, 607 (1985)). "As long as the prosecutor has probable cause to believe that an offense has been committed, the decision whether to prosecute "generally rests entirely in [the prosecutor's] discretion. *Id.* (citing *Bordenkircher v. Hayes*, 434 U.S. 357 (1978)) (change in original). However, "the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (citing *Wayte*, 470 U.S. at 608). "[S]elective prosecution claims are assessed according to 'ordinary equal protection standards.'" *Id.*

A prima facie case under an equal protection claim consists of "identifying the group to which the defendant belonged and demonstrating that the identified group was treated disparately under the laws as written or applied." *Id.* For a selective prosecution claim, "the defendant must demonstrate that a prosecutorial policy results in a discriminatory effect, based on an unlawful classification. *Id.* (citing *Wayte*, 470 U.S. at 608). The United States Supreme Court has stated that "the claimant must demonstrate

that the . . . prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *U.S. v. Armstrong*, 517 U.S. 456, 465 (1996). "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.*[3]

In this case, Miguel has made no attempt to identify similarly situated individuals of a different race that were not prosecuted. Although Miguel has shown that he belongs to a suspect class, he has failed to show even one other person that was not prosecuted despite acting in a manner similar to Miguel's actions in this case. Instead, Miguel has focused on the numerous charges against and police incidents involving Miguel and James. (*See* T.0261:61-62 at 10-25, 1-16; Aplt. Brf. at 11-13). There are four main problems with this approach: 1) many of the listed charges did not involve

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[3] Miguel's brief as well as some cases fail to distinguish between selective prosecution and selective enforcement. (*See* Aplt. Brf. at 24 ("repeated criminal charges by the *police,*" emphasis added)). They also fail to distinguish between the standard for a prima facie case of selective prosecution and the showing required for a defendant to be entitled to *discovery* on a selective prosecution claim. (*See* Aplt. Brf. at 27 (citing "some evidence" requirement "[t]o obtain *discovery* on this claim," emphasis added). However, a selective prosecution claim and a selective enforcement claim are not sufficiently different to require discussion for the purposes of this appeal. *See U.S. v. Alcarez-Arellano*, 2006 US App. LEXIS 7797, No. 04-3230, 26-27 (after describing elements for selective prosecution claim, stating, "The elements are essentially the same for a *selective-enforcement* claim."). Like a prima facie case of selective prosecution, before a defendant will be entitled to *discovery* on a selective prosecution claim, he must "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not." *Armstrong*, 517 U.S. at 469. Because, as noted below, Miguel fails to present any evidence of similarly situated persons of other races that were not prosecuted, he cannot reach this apparently lower discovery standard nor the prima facie case standard.

Provo City nor Provo City Prosecutors, (T.0261:71 at 12-14; *see* Aplt. Brf. at 11-12), 2) two of the three cases involving Provo City charges were dismissed "when police witness[es] fail[ed] to appear at trial," (T.0261:71 at 14-17; Aplt. Brf. at 12), 3) the list failed to show charges for which the Gedos had been convicted, (T.0261:71 at 18-20; *see* Aplt. Brf. at 13-14), and 4) there was no showing that Provo City had failed to prosecute even one person of a different race who committed the same or a similar crime.

Miguel's conspiracy theory that all of Utah is prejudiced against him lacks evidentiary support. As Judge McVey noted, "unless there's some evidence that Provo City is in union with the other cities and there's some type of conspiracy there I think you have to look mostly at what Provo City did." (T.0261:71 at 20-23). Without evidence of such a conspiracy, the number of charges in and outside of Provo City indicate Miguel's propensity to break the law more than a State-wide conspiracy against him.

The fact that two officers failed to appear as witnesses for trial also does not indicate discrimination against Miguel because of his race. An officer might fail to appear as a witness for trial for many reasons other than racial discrimination. (see T.0261:71 at 16-17 (indicating that one officer had joined the FBI)). As with this case, Miguel has failed to provide any evidence that the officers in those cases did anything due to racial animus. Judge McVey also noted that Miguel had been convicted a time or two on Provo City charges. (T.0261:71 at 18-20).

Finally, these raw and incomplete numbers fail to show that similarly situated persons of other races were not charged. As the United States Supreme Court noted, "raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*." *U.S. v. Bass*, 536 U.S. 862, 864 (2002). In regards to the current case as well as the previous ones, Miguel has failed to indicate even one similarly situated person of another race that was not prosecuted by Provo City.

Miguel has also failed to present adequate evidence of discriminatory intent. The only evidence presented by Miguel and his counsel consisted of testimony by Miguel and James and statements by Miguel's counsel. (*See* Aplt. Brf. at 12-13, 24-25, 27; T.0261:61, 76 at 5-9, 11-21). Unsubstantiated statements by the Gedos and their counsel are simply "insufficient to overcome the presumption that the prosecutor acted without bias." *See State v. Wallace*, 2005 UT App 306, ¶7 (unpublished, attached as addendum) (indicating that "Defendant's self-serving affidavits are insufficient to overcome the presumption"). Absent any showing of discriminatory intent by the police or the prosecutor, Judge McVey did not err in "not find[ing] any selective prosecution on the basis of racial category." (*See* T.0261:79 at 15-16).

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons, Provo City asks this Court to affirm the trial court's verdict finding Miguel guilty of Disorderly Conduct, Interference with Arresting Officer, and Reckless Driving.

DATED this 1st day of May, 2006.

Vernon F. Romney
VERNON F. ROMNEY
Counsel for Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, two true and correct copies of the foregoing Brief of Appellee to Laura H. Cabanilla, Esplin & Weight, 43 East 200 North, P.O. Box "L", Provo, Utah 84603-0200 this 1st day of May, 2006.

ADDENDUM

STATE STATUES

Utah Code Ann. § 10-8-30

Utah Code Ann. § 41-1a-1101

Utah Code Ann. § 41-6-16 (2003)

Utah Code Ann. § 41-6-102 (2003)

Utah Code Ann. § 76-2-406

PROVO CITY ORDINANCES

Provo City Code § 9.17.080(4)

CONSTITUTIONAL PROVISIONS

Utah Constitution, Article I, Section 14

United States Constitution, Amendment IV

UNREPORTED CASES

State v. Wallace, 2005 UT App 306

STATE STATUTES

Utah Code Ann. § 10-8-30 Traffic Regulations

They may regulate the movement of traffic on the streets, sidewalks and public places, including the movement of pedestrians as well as of vehicles, and the cars and engines of railroads, street railroads and tramways, and may prevent racing and immoderate driving or riding.

Utah Code Ann. § 41-1a-1101 (2003) Seizure -- Circumstances where permitted -- Impound lot standards

(1) The division or any peace officer, without a warrant, may seize and take possession of any vehicle, vessel, or outboard motor:

(a) that the division or the peace officer has reason to believe has been stolen;

(b) on which any identification number has been defaced, altered, or obliterated;

(c) that has been abandoned on the public highways;

(d) for which the applicant has written a check for registration or title fees that has not been honored by the applicant's bank and that is not paid within 30 days;

(e) that is placed on the water with improper registration; or

(f) that is being operated on a highway:

(i) with registration that has been expired for more than three months;

(ii) having never been properly registered by the current owner; or

(iii) with registration that is suspended or revoked.

(2) If necessary for the transportation of a seized vessel, the vessel's trailer may be seized to transport and store the vessel.

(3) Any peace officer seizing or taking possession of a vehicle, vessel, or outboard motor under this section shall comply with the provisions of Section 41-6-102.5.

Utah Code Ann. § 41-6-16 (2003) Uniform Application of Chapter – Effect of Local Ordinances

The provisions of this chapter are applicable and uniform throughout this state and in all of its political subdivisions and municipalities. A local authority may not enact or enforce any rule or ordinance in conflict with the provisions of this chapter. Local

authorities may, however, adopt ordinances consistent with this chapter, and additional traffic ordinances which are not in conflict with this chapter.

Utah Code Ann. § 41-6-102 (2003) Peace Officer Authorized to Move Vehicle

(1) If a peace officer finds a vehicle in violation of Section 41-6-101, the officer may move the vehicle, cause the vehicle to be moved, or require the driver or other person responsible for the vehicle to move the vehicle to a safe position off the highway.

(2) A peace officer may remove or cause to be removed to a place of safety any unattended vehicle left standing upon any highway in violation of this article or in a position or under circumstances that the vehicle obstructs the normal movement of traffic.

(3) In accordance with Section 41-6-102.5, a peace officer may remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a highway when:

(a) the vehicle has been reported stolen or taken without the consent of its owner;

(b) the person responsible for the vehicle is unable to provide for its custody or removal; or

(c) the person operating the vehicle is arrested for an alleged offense for which the peace officer is required by law to take the person arrested before a proper magistrate without unnecessary delay.

Utah Code Ann. § 76-2-406 Force in Defense of Property

A person is justified in using force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property:

(1) lawfully in his possession; or

(2) lawfully in the possession of a member of his immediate family; or

(3) belonging to a person whose property he has a legal duty to protect.

PROVO CITY ORDINANCES

Provo City Code § 9.17.080(4)

Any motor vehicle with respect to which four (4) or more Notices of Infraction are in default is hereby declared to be a public nuisance and Provo City may authorize said motor vehicle to be towed from the public streets at the expense and risk of the registered

owner. Said motor vehicle shall be held and not released until the unpaid fees, and reasonable costs of towing and storage have been paid.

CONSTITUTIONAL PROVISIONS

Utah Constitution, Article I, Section 14

The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Appellee,

v.

Orrin Bruce Wallace,

Defendant and Appellant.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20040237-CA

F I L E D
(June 30, 2005)

2005 UT App 306

Fifth District, St. George Department, 031500641

The Honorable G. Rand Beacham

Attorneys: Margaret P. Lindsay, Orem, for Appellant

Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

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Before Judges Billings, Greenwood, and Jackson.

GREENWOOD, Judge:

Defendant Orrin Bruce Wallace appeals his conviction of assault by a prisoner, a third degree felony, in violation of Utah Code section 76-5-102.5. See Utah Code Ann. § 76-5-102.5 (2003). We affirm.

Defendant argues his trial counsel was ineffective by failing to file or pursue Defendant's claim that the State was selectively

prosecuting him on the basis of his race.[1]

> To prevail on an ineffective assistance of counsel claim, "'a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'"

Myers v. State, 2004 UT 31,¶20, 94 P.3d 211 (quoting Wickham v. Galetka, 2002 UT 72,¶19, 61 P.3d 978) (additional citation omitted); see also Strickland v. Washington, 466 U.S. 668, 687 (1984). "In making this evaluation, the court must 'indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" Myers, 2004 UT 31 at ¶20 (quoting State v. Templin, 805 P.2d 182, 186 (Utah 1990)) (additional quotations and citations omitted).

First, the performance of Defendant's trial counsel was not "below an objective standard of reasonableness." Id. For instance, Defendant's trial counsel apparently advised Defendant that his selective-prosecution claim did not square with her trial strategy. Counsel's failure to raise a claim may be presumptively sound trial strategy. See State v. Dunn, 850 P.2d 1201, 1225 (Utah 1993) (noting an act that "might be considered sound trial strategy" does not demonstrate inadequacy of counsel); see also Myers, 2004 UT 31 at ¶20 (presuming trial counsel's action was "sound trial strategy" (quotations and citations omitted)). In addition, Defendant's pro se motion explicitly stated that he was pursuing the selective-prosecution action "without the assistance of counsel."

Moreover, Defendant was not prejudiced by his trial counsel's failure to pursue the selective-prosecution claim. Indeed, the trial court, affording procedural leniency to Defendant, allowed Defendant to file his first motion and affidavit at the conclusion of his trial, notwithstanding the State's objection. Nonetheless, the trial court chose not to rule on either of Defendant's motions. Further, the trial court did not err by not considering Defendant's motions or allowing Defendant further discovery because, as presented, those motions were insufficient.

Indeed, the United States Supreme Court has opined on the heavy burden of such a claim:

> A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a

> demanding one. These cases afford a background presumption that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

United States v. Armstrong, 517 U.S. 456, 463-64 (1996) (internal quotations and citation omitted).

This court also addressed selective-prosecution claims in State v. Geer, 765 P.2d 1 (Utah Ct. App. 1988). In Geer, we noted, "Prosecutors are given broad discretion in determining whether to prosecute." Id. at 3 (citing Wayte v. United States, 470 U.S. 598, 607 (1985)). "As long as the prosecutor has probable cause to believe that an offense has been committed, the decision regarding whether to prosecute 'generally rests entirely in [the prosecutor's] discretion.'" Id. (alteration in original) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)). "Although selective prosecution claims are assessed according to 'ordinary equal protection standards,' the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" Id. (quoting Wayte, 470 U.S. at 608). As here, "a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent." United States v. Bass, 536 U.S. 862, 863 (2002). To show discriminatory effect, "the defendant must make a 'credible showing' that 'similarly situated individuals of a different race were not prosecuted.'" Id. (quoting Armstrong, 517 U.S. at 465, 470).

Here, Defendant's only evidence of the prosecutor's alleged deliberate racial bias consisted of his two affidavits, the first of which did not identify the race of Defendant's example of a similarly situated inmate. In light of the small sample size--two other inmates--and self-serving nature of Defendant's affidavits, the trial court did not find Defendant's evidence credible. Indeed, Defendant's self-serving affidavits are insufficient to overcome the presumption that the prosecutor acted without bias. See United States v. Peete, 919 F.2d 1168, 1176 (6th Cir. 1990) (upholding district court's conclusion that the defendant's self-serving affidavit and an affidavit from his counsel did not support his selective-prosecution claim); cf. State v. Gutierrez, 2003 UT App 95,¶10, 68 P.3d 1035 (ruling a self-serving "affidavit, by itself, is insufficient to invalidate a prior conviction").

Because we determine that Defendant's selective-prosecution claim is without merit, Defendant's trial counsel's failure to pursue it did not prejudice Defendant. See State v. Kelley, 2000 UT 41,¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel."); see also Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998) ("It was not constitutionally ineffective assistance for [the defendant's] resentencing counsel not to pursue futile claims."). Under such a conclusion, Defendant's ineffective assistance of counsel claim fails.

Accordingly, we affirm the trial court's ruling.

Pamela T. Greenwood, Judge

WE CONCUR:

Judith M. Billings,

Presiding Judge

Norman H. Jackson, Judge

1. Actually, Defendant's accusations are better characterized as selective plea bargaining. According to Defendant's affidavits, both of the fellow inmates to whom Defendant compared himself were prosecuted, but were offered plea deals by the State.